UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK
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UNITED STATES OF AMERICA

vs. 5:11-CR-602

JOSEPH VINCENT JENKINS,

Defendant.
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Transcript of a Re-Sentencing held on January 5, 2018, at the James Hanley Federal Building, 100 South Clinton Street, Syracuse, New York, the HONORABLE GLENN T. SUDDABY, Chief Judge, Presiding.

A P P E A R A N C E S

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(Open Court, 10:55 a.m.)

THE CLERK: Case number 5:11-CR-602, United States of America versus Joseph Vincent Jenkins. Counsel, please note your appearance for the record.

MS. THOMSON: Good morning, your Honor, Tamara Thomson on behalf of the United States.

THE COURT: Good morning.

MS. PEEBLES: Good morning, your Honor, Lisa Peebles appearing on behalf of Joe Jenkins. Mr. Jenkins is also present.

THE COURT: Good morning. We're here for resentencing as result of a mandate from the Circuit and there have been submissions by counsel, I've had the opportunity to review them, I've reviewed everything that's been submitted, and we're obviously, I'm not going to ask about the presentence report because we've been through that, same presentence report has been received and reviewed by all parties; I take it that's the case?

MS. PEEBLES: It is, your Honor.

MS. THOMSON: Yes, your Honor.

THE COURT: Okay, then I'll ask the government to go ahead.

MS. THOMSON: Your Honor, I would rely on the sentencing memorandum submitted, the government's response to the defendant's sentencing memorandum, and each of the

arguments that were advanced in the Exhibit A that was attached to the government's sentencing memorandum, that is the petition of the United States for panel rehearing.

THE COURT: Okay. And with regard to what appears to be a new argument from defendant with regard to restitution and the fine, the government's position?

MS. THOMSON: Government's position is it's not appropriate and it wasn't called for to be redetermined at this stage and so for the arguments advanced in our response, it's the government's position the court doesn't need to address those. If the court decided to address those, it's the government's position that the original fine and original restitution amount were appropriate and supported by the evidence.

THE COURT: Which have already been collected is my understanding, they've been paid?

MS. THOMSON: That's correct, yes.

THE COURT: Ms. Peebles.

MS. PEEBLES: Thank you, your Honor. In my sentencing submission to the court, I'm reiterating what the mandate suggested by the Second Circuit and that is it echoes the original sentencing memorandum that I filed back in September of 2014 concerning the enhancements. In this instance, four of the enhancements that were applied raised Mr. Jenkins' advisory Guideline offense level or advisory

range up toward the statutory maximum for the offense and while the court applied those enhancements because they technically would apply, in this instance, it was our position that they shouldn't have been applied because they are not the product of empirical research, empirical study by the Commission, and that applying those enhancements in every run-of-the-mill case certainly is unreasonable and I think that's what the Circuit was saying in its opinion.

Specifically in this case, Mr. Jenkins is a first-time offender, there were no allegations that he distributed child pornography and there were no allegations that he ever attempted to contact a child or that he was ever in communication with any other individual who was promoting or distributing child pornography. Based on those factors, it would seem unreasonable to apply all of those enhancements that would apply in those types of cases which catapulted Mr. Jenkins' Guidelines up toward the statutory maximum.

I think it's important for the court to note that Mr. Jenkins has been in custody for six years and he has not had any disciplinary infractions since he's been in BOP custody which I think the court -- would be important for this court to know. He's been, in all respects, very respectful to those who have had him in custody at BOP and complying in all respects in that regard. I think, your Honor, that that shows and demonstrates that Mr. Jenkins is

somebody who could follow court order and comply with conditions of supervised release.

So with that, your Honor, I would ask the court to consider adopting the mandate by the Circuit and that is not applying the four-level enhancements that were applied in this instance which we've calculated even if the court does add the levels for obstruction of justice and puts him at a level 24, in a criminal history --

THE COURT: When you say even if I do, is there some argument why I shouldn't with regard to obstruction of justice and perjury?

MS. PEEBLES: Well, I'm not arguing against that two-level enhancement, so if the court applies that, that would be a level 24 and a category I which would recommend a range of 51 to 63 months. If the court were to apply the minimum in this case, it would be the higher end of that level which would be 60 months, and your Honor, I think that that would be a reasonable sentence in light of the factors that the Second Circuit outlined in its decision.

And I do think, your Honor, that Mr. Jenkins is not the same person that he was when he initially appeared in front of the court for sentencing.

I note that a lot of the frustration that the court had with Mr. Jenkins stemmed from a lot of antics in his -- Mr. Jenkins' frustration with the whole process but I do

think, your Honor, he is a changed individual and I do think, your Honor, that he is respectful to the court, and the process, and understands what he has to do, and which brings me to my next argument with regard to the supervised release.

In deciding the amount of time to impose with regard to supervision in this case, it's our position, and I outline in my sentencing submission to the court that five years would be appropriate, in light of the fact that he, again, is a first-time offender, and I think he's capable of abiding by the terms and conditions that the court would impose, some of which I think the Circuit has outlined and suggested were not appropriate under the circumstances without additional findings. And in this case I think it's important to know that Mr. Jenkins has never had any contact with a minor, inappropriate contact with a minor, there's never been any allegation or suggestion that he has, and therefore adopting the recommendation of the Second Circuit, I would just ask the court to maybe consider not opposing -- or not imposing some of those conditions, that is having absolutely no contact with anyone under the age of 18, and also the restrictions of his computer usage and also with regard to his inability to use and access credit cards.

I think that Mr. Jenkins is somebody, your Honor, who will and can be a productive member of the community. For years he did operate his own business as an electrician,

I think he has great family support by his parents, and your Honor, I think that Mr. Jenkins wants nothing more than to be released and be able to reintegrate back into the community and start over again, with the hopes that he'll never do anything that would land him in this position again.

So with that, your Honor, I do think Mr. Jenkins is somebody who has changed and he has more respect for the process and the system, and I'm hopeful that the court will consider my arguments and my sentencing submission and impose the statutory minimum in this case. Thank you.

THE COURT: Counsel, I've received your submissions and have considered them. The -- I have a lengthy statement that I'm going to read into the record as to the mandate from the Circuit, my original sentence, and the sentence I'm about to give today. But before I do that, I only have one thing to say to you outside of that, Counsel, and that is, you use the term frustration with this court, and it was used in the mandate from the Circuit. I have no personal -- and Mr. Jenkins, I'm talking to you directly, sir, no personal animosity against Mr. Jenkins or any other defendant. I have no frustration with Mr. Jenkins. His behavior is his behavior, and his criminal behavior was evaluated and I believe appropriately responded to by this court. But this has never been personal, never would be personal, with regard to any defendant, and it certainly isn't with regard to

Mr. Jenkins. So that should be perfectly clear, Counsel, the court doesn't have any frustration with Mr. Jenkins. Mr. Jenkins behaved the way he behaved, his criminal behavior is his criminal behavior, and that's all there is to it.

Mr. Jenkins, would you like to be heard, sir, before I impose sentence?

THE DEFENDANT: No.

THE COURT: You have nothing you'd like to say?

THE DEFENDANT: (Gesturing negatively.)

THE COURT: Okay, sir. The statement that I'm about to read is very lengthy, I'm going to warn you that, and it's -- it will be attached to the statement of reasons and go to the Circuit, and that should be clear. Some of the cites that I'm going to refer to, I'm not going to give the full cite because, as I've indicated, it will be attached to the statement of reasons.

We are here today to address the Second Circuit's mandate, in which a divided panel vacated Mr. Jenkins' sentence and remanded the case back to me for resentencing. According to the mandate, the panel found no procedural issues with the sentence; however, the majority found the sentence, including the supervised release term and certain special conditions, substantively unreasonable. One judge concurred with the unreasonableness of the supervised release term, but disagreed with the majority's opinion relating to

the imprisonment portion of the sentence. In her dissenting opinion, Senior Judge Kearse indicated she dissented from "so much of the majority's opinion" and explained:

"As is revealed in the summary order filed contemporaneously in this case, the district court in sentencing Jenkins did not commit any procedural error. Where we have determined 'that the district court's sentencing decision is procedurally sound,' we reverse on the the basis of substantive unreasonableness only if the sentence 'cannot be located within the range of permissible decisions.' Given this record in which Jenkins disputed any justification or authority for prosecuting him, and argued that instead the children who were victims of the child pornography should have been prosecuted, the district court's concern for the likelihood that, without a lengthy prison term, Jenkins would reoffend was not unreasonable, and I cannot conclude that the imposition of the prison term that was no higher than midway between the top and bottom of the Guidelines range 'cannot be located within the range of permissible decisions.'"

I too disagree with the majority's opinion in many ways. To begin, I greatly take issue with the conclusions that Mr. Jenkins is a run-of-the-mill case and that the sentence was excessive because it fails to avoid unwarranted sentencing disparities; two, the 2G2.2 Guideline yielded a

sentence in Mr. Jenkins' case that was derived substantially from outdated enhancements related to his collecting behavior; three, it was substantively unreasonable for me to have applied the 2G2.2 enhancements in a way that placed Jenkins at the top of the range with the very worst offenders; and four, that I dramatically increased Mr. Jenkins' sentence by exclusively relying on his conduct at trial and during sentencing proceedings; five, that I concluded his denial of acceptance of responsibility was insufficient, so I added years and years on to Mr. Jenkins' sentence; and that my frustration dramatically increased Mr. Jenkins' sentence. It's patently just untrue.

Over three years ago, I imposed a sentence that was within Mr. Jenkins' applicable Guidelines range; one that fell below the middle of the range of 210 to 262 months. I did not conjure up this range. I did not personally increase the range out of frustration or in any way add years and years on to Mr. Jenkins' sentence. In fact, as the panel concluded in its summary order, I did not commit any procedural error. As the panel well knows, the Guidelines are implemented and amended at the direction of Congress, and their application is solely driven by a defendant's conduct; taking into consideration both mitigating and aggravating factors. I believe it is my responsibility to take every single child pornography case on its specific facts and to

decide in light of those facts if the Guideline range is too high or too low. We all know the Guidelines are not mandatory, but I begin every sentencing by reviewing those Guidelines. I then carefully review and consider the parties' arguments in the backdrop of 3553(a) factors to arrive at a sentence that I believe is fair and just; one that is reasonable and not greater than necessary to serve the goals of sentencing.

The Supreme Court has clearly defined the role of the sentencing judge and the appellate court. In *Rita* and *Gall*, the Supreme Court held: A district court should begin all sentencing proceedings by correctly calculating the applicable Guideline range. As a matter of administration and to secure nationwide consistency, the Guidelines should be the starting point and the initial benchmark." And there are cites to *Gall* and *Rita*. The Supreme Court further held in *Gall*:

"Regardless of whether the sentence imposed is inside or outside the Guidelines range, the appellate court must review the sentence under an abuse-of-discretion standard. It must first ensure that the district court committed no significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range, treating the Guidelines as mandatory, failing to consider the 3553(a) factors, selecting a sentence based on clearly

erroneous facts, or failing to adequately explain the chosen sentence -- including an explanation for any deviation from the Guidelines range. Assuming that the district court's sentencing decision is procedurally sound, the appellate court should then consider the substantive reasonableness of the sentence imposed under an abuse-of-discretion standard. When conducting this review, the court will, of course, take into account the totality of the circumstances, including the extent of any variance from the Guidelines range. If the sentence is within the Guidelines range, the appellate court may, but is not required to, apply a presumption of reasonableness."

"Practical considerations also underlie this legal principle. The sentencing judge is in a superior position to find facts and judge their import under 3553(a) in the individual case. The judge sees and hears the evidence, makes credibility determinations, has knowledge of the facts and gains insights not conveyed by the record. 'The sentencing judge has access to, and greater familiarity with, the individual case and the individual defendant before him than the Commission or the appeals court.' Moreover, '[d]istrict courts have an institutional advantage over appellate courts in making these sorts of determinations, especially as they see so many more Guidelines cases than appellate courts do,'" and the cite is omitted.

"It has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue."

It was in this vein as a sentencing judge that I considered the totality of Mr. Jenkins' history, his specific characteristics, and his conduct, and that I sentenced him in accordance with the 3553(a) factors. I carefully weighed the nature and circumstances of his offense along with his history and characteristics and found a Guidelines sentence of 225 months was sufficient but not greater than necessary to meet the goals of sentencing. At that time, I found not one compelling reason to vary from his advisory Guidelines range based on the totality of his conduct, the results of his competency evaluation, and his behavior following his arrest, including his failure to appear in Canada and his behavior in the Northern District of New York, which all demonstrated a complete disdain and lack of respect for the law. I particularly found Mr. Jenkins was very likely to reoffend and a lengthy sentence was necessary to reflect the seriousness of his conduct; to promote respect for the law; and provide him with adequate deterrence for committing further crimes; and to protect the public.

After reconsidering Mr. Jenkins' offense

conduct, including the content of his child pornography collection, his long record before this court, the Second Circuit's mandate, the parties' submissions on appeal, and available statistics and research relating to nonproduction child pornography offenders, I now find a non-Guidelines sentence of 200 months is sufficient but not greater than necessary in light of Mr. Jenkins' characteristics and the need for the sentence to reflect the seriousness of his conduct; to promote respect for the law; to provide him with adequate deterrence from committing further crimes; and to protect the public.

Three years ago, and again today, I find that Mr. Jenkins is not the typical non-production offender described in *Dorvee* or in the majority opinion in *Jenkins*. Unlike the so-called run-of-the-mill non-production cases, it was not the 2G2.2 Guideline that yielded the higher Guidelines range in Mr. Jenkins' case. What drove Mr. Jenkins' Guidelines higher than the typical child pornography case was his failure to accept responsibility and his obstruction of justice. It was this atypical conduct that set Mr. Jenkins apart from other non-production cases, and from federal offenders in general. Unlike the comparisons offered in the majority opinion in *Jenkins*, a true comparison demonstrates the majority failed to compare Mr. Jenkins to similarly-situated defendants and further

failed to adequately account for the offense level increases based on Chapter Three adjustments that have nothing to do with the child pornography Guidelines. The majority further failed to adequately consider Mr. Jenkins' characteristics, which make him more dangerous and much more likely to reoffend when compared to other child pornography offenders.

According to the Sentencing Commission statistics for those sentenced in 2014, the year Mr. Jenkins was sentenced, only 2.1 percent of all defendants obstructed justice, and only 4.5 percent of all defendants did not accept responsibility. In child pornography cases, the same percentage of defendants, 4.5, did not accept responsibility. These sentencing statistics clearly distinguish Mr. Jenkins from the vast majority of federal offenders, who receive lower sentences because they accept responsibility for their crimes, and do not obstruct the administration of justice.

The *Jenkins* majority spent a great deal of time discussing *Dorvee* and relying on various statistics and mathematical comparisons to illustrate that Mr. Jenkins should be treated as the least culpable of non-production cases. In *Dorvee*, the Second Circuit explained, and I quote:

"An ordinary first-time offender is therefore likely to qualify for a sentence of at least 168 to 210 months, rapidly approaching the statutory maximum, based solely on sentencing enhancements that are all but inherent

to the crime of conviction. Consequently, adherence to the Guidelines results in virtually no distinction between the sentences for defendants like Dorvee, and the sentences for the most dangerous offenders....This result is fundamentally incompatible with 3553(a). By concentrating all offenders at or near the statutory maximum, Section 2G2.2 eviscerates the fundamental statutory requirement in 3553(a) that district courts consider 'the nature and circumstances of the offense and the history and characteristics of the defendant' and violates the principle, reinforced in *Gall*, that courts must guard against unwarranted similarities among sentences for defendants who have been found guilty of dissimilar conduct." And I cite *Gall*, affirming a sentence where "it is perfectly clear that the District Judge considered the need to avoid unwarranted sentencing disparities, but also considered the need to avoid unwarranted similarities among other co-conspirators who were not similarly situated."

None of the comparisons made in *Dorvee* or in the majority decision in *Jenkins* involve offenders who are similarly situated to Mr. Jenkins. In fact, the mean and median sentences offered as "meaningful comparisons" are based on offenders who, unlike Mr. Jenkins, accepted responsibility and did not obstruct justice. Any meaningful comparison would recognize that Mr. Jenkins is not the typical offender and would require a more case-specific

comparison of the sentencing data. I fail to understand why the majority would tell me or any judge to undermine the sentencing process and to create disparities by completely ignoring Chapter Three adjustments that play a very important role in our federal system.

When the correct comparison is made, Mr. Jenkins is clearly distinguished from the typical first-time offender, who, according to *Dorvee*, qualifies for a sentence rapidly approaching the statutory maximum based solely on sentencing enhancements that are all but inherent to the crime of conviction. The first distinction in Mr. Jenkins' case is that the statutory maximum sentence is 360 months, and the sentence I imposed was 225 months. It is not near, or exceeding, the statutory maximum. Second, the sentence I imposed was not based solely on sentencing enhancements that are all but inherent to the crime of conviction. Had Mr. Jenkins been the typical non-production offender which just -- with just the all-but-inherent enhancements, his Guidelines range would have been 121 to 151 months. However, unlike most federal offenders, Mr. Jenkins took his case to trial, committed perjury, and was relentless in his attempts to avoid any culpability during court proceedings. Blaming this court or anyone else for Mr. Jenkins' sentencing range is sorely misplaced. It was Mr. Jenkins and Mr. Jenkins alone who caused his Guidelines

to jump 89 to 111 months to a range of 210 to 262. This belies the majority's opinion that this range was derived substantially from outdated enhancements related to his collecting behavior; that I added years and years on to Mr. Jenkins' sentence in light of his persistent rudeness and disrespect; and that I dramatically increased his sentence out of frustration. In short, it was Mr. Jenkins' aggravating criminal conduct that generated his higher Guidelines range.

The Second Circuit has consistently denied challenges of unreasonableness based on unwarranted sentencing disparities under 18 U.S.C. Section 3553(a)(6), when defendants are not similarly situated. See *United States v. Serrano*. "...Serrano has failed to demonstrate" -- I'm quoting, "that co-defendants who received lower sentences were, in fact, similarly situated to him. As Serrano acknowledges, co-defendants receiving lower sentences pleaded guilty, whereas Serrano proceeded to trial and did not accept responsibility for his conduct." See *United States v. Fearon-Hales*, finding that the disparate sentences are not unwarranted when the other defendants had pled guilty and cooperated with the government and the defendant had not. In *Hatala*, the Second Circuit held:

"Insofar as Hatala argues that the district court failed to avoid unwarranted disparities between his

sentence and lesser sentences subsequently imposed by other judges in the same district on other defendants prosecuted for the same crime, we have already observed that he fails to demonstrate that he is similarly situated to his comparators. Moreover, such disparity is one factor, not the determinative factor, to be considered in identifying the appropriate sentence under 3553(a). Here, the district court expressly stated that it had considered all the 3553(a) factors in determining Hatala's sentence. In light of the totality of the circumstances, including aggravating factors pertinent to Mr. Hatala, we identify no merit in the claim that sentencing disparity renders Hatala's 30-month prison sentence substantively unreasonable." And the cite follows.

A sentence well below Mr. Jenkins' Guidelines range would have failed to adequately take into account his specific offense conduct and his characteristics, and would have ignored the important function of acceptance of responsibility in the federal sentencing process. As reflected in the background commentary in U.S.S.G. 3E1.1, the reduction for acceptance of responsibility recognizes legitimate societal interests. The commentary emphasizes: "For several reasons, a defendant who clearly demonstrates acceptance of responsibility for his offense by taking, in a timely fashion, the actions listed in the Guidelines is appropriately given a lower offense level than a defendant

who has not demonstrated acceptance of responsibility." The importance of crediting defendants with acceptance of responsibility has been recognized by the Second Circuit for decades. In *Cruz*, the Second Circuit explained, and I quote:

"Courts have long recognized that trial judges are entitled to encourage guilty pleas by imposing on a defendant who pleads guilty a lesser sentence than would have been imposed had the defendant stood trial...Though that 'discount' means, in effect, that a defendant who stands trial receives a higher sentence than would have been imposed if he had pled guilty, courts have accepted traditional 'discount' approach, apparently on the rationale that the reduced sentence for a guilty plea represents a reduction from a sentencing norm ascertained independent of the procedure by which guilt is ascertained."

Likewise, an individual who takes his case to trial and then commits perjury should not be given the same sentence as someone who pleads guilty and who doesn't obstruct justice. Case law is replete with decisions that recognize the importance of the obstruction enhancement. For example, in *Dunnigan*, the Supreme Court found the commission of perjury is "of obvious relevance" to determining the appropriate type and extent of punishment after the issue of guilt has been resolved because it reflects on the defendant's criminal history, his willingness to accept

commands of law and authority of court, and on his character in general. The Supreme Court indicated, and I quote:

"A sentence enhancement based on perjury does deter false testimony in much the same way as a separate prosecution for perjury. But the enhancement is more than a mere surrogate for a perjury prosecution. It furthers legitimate sentencing goals relating to the principal crime, including the goals of retribution and incapacitation. It is rational for a sentencing authority to conclude that a defendant who commits a crime and then perjures himself or herself in an unlawful attempt to avoid responsibility is more threatening to society and less deserving of leniency than a defendant who does not so defy the trial process. The perjuring defendant's willingness to frustrate judicial proceedings to avoid criminal liability suggests that the need for incapacitation and retribution is heightened as compared with the defendant charged with the same crime who allows judicial proceedings to progress without resorting to perjury." And again, I'm citing *United States v. Dunnigan*, Supreme Court case.

Had I imposed a sentence without regard to the Chapter Three adjustments, I would have committed the very violation that is alleged by the *Jenkins* majority. I would have failed to distinguish Mr. Jenkins from less culpable and less dangerous offenders, who demonstrate some respect for

the law, who express remorse, and who don't blame others, including the victims themselves. Such a sentence would have failed to avoid unwarranted sentencing disparities involving offenders whose sentences fall within the 121- to 151-month range because they were credited with acceptance. *United States v. Aumais*, and I'm quoting, "Finding a sentence of 121 months was substantively reasonable because the Guidelines range of 121 to 151 months was well short of the statutory maximum, which was 30 years had the district court chosen to impose consecutive sentences, and the district court found that 121 months imprisonment was 'sufficient, but not greater than necessary' to comply with the purposes of 3553(a) given the violent nature of the images, the number of them, and other considerations."

In order to avoid unwarranted disparities, I requested case-specific sentencing data from the Sentencing Commission Office of Research and Data in order to compare Mr. Jenkins to similarly-situated defendants. As the *Jenkins* majority recognized, "[i]n general, a district court need not consult the Commission's statistics because there is 'no assurance of comparability.'" Nevertheless, since the majority contends I failed to consider readily available statistics to allow for a meaningful comparison of Mr. Jenkins' behavior to that of other child pornography offenders, I obtained the following sentencing data from the

commission relating to offenders who are like Mr. Jenkins with one exception. Of the 14 offenders found to be similar to Mr. Jenkins over a five-year period, 12 of the 14 offenders received a two-level reduction for mere possession or receipt of child pornography pursuant to U.S.S.G. Section 2G2.2 -- 2.2(b)(1). As Mr. Jenkins did not receive this reduction because he transported the pornography into Canada, his Guideline range was two levels higher than most in the comparison group. According to the Commission, nationally from fiscal years 2012 through 2016, there were only 14 offenders sentenced under the 2G2.2 Guideline who, like Mr. Jenkins, did not receive acceptance of responsibility; received an adjustment for obstruction of justice; did not receive an enhancement for pattern of activity involving the sexual abuse of a minor; and who did not receive an enhancement for distribution; but who otherwise received the same enhancements as Mr. Jenkins. Of the 14 offenders, eight, 57.2, were sentenced within the Guideline range; one, which would be 7.2 percent, was sentenced below the Guideline range sponsored by the government; and five, 35.7, were otherwise sentenced below the Guideline range. The average sentence for these 14 offenders was 140 months. The average sentence of the eight offenders who received the Guideline sentence was 170 months. Again, Mr. Jenkins' Guidelines range was two levels higher than most of this comparison

group because he transported the material across the border into Canada and did not receive a two-level reduction under U.S.S.G. Section 2G2.2 -- .2(b)(1). However, after considering the sentencing data and the majority's opinion, I agree that Mr. Jenkins is "relatively less culpable" among defendants convicted of transportation because it appears he was bringing his collection to Canada for his own use rather than to sell or to distribute to others. We have no proof to suggest that he was intending to distribute or sell to others. While I do take exception with the criticism of the majority with regard to the significance of crossing an international border with child pornography, it's not like going from New York to Connecticut, this is an international border where you're subject to search, and that search is likely to happen and certainly if you've ever crossed that border, you would be aware of that, which brought the attention of the prosecution to mention that in their sentencing memorandum. An indication of how important this pornography, child pornography material was to Mr. Jenkins. Although I find transportation of child pornography across the border very serious, I agree, this is not the typical transportation case, and accordingly, I have resentenced Mr. Jenkins as if he had received the two-level reduction under U.S.S.G. Section 2G2.2(b)(1) and as if his advisory Guideline range had been 168 to 210 months.

The Commission's sentencing data shows that, unlike the data relied upon in *Dorvee* and in *Jenkins*, an individualized, case-specific comparison demonstrates the sentence that I have reimposed is not substantively unreasonable when Mr. Jenkins is compared to similarly-situated individuals, and I have not failed to avoid unwarranted sentencing disparities. In fact, when compared to sentences received by similar offenders, a sentence of 200 months is not shockingly high, not shockingly low, or otherwise unsupported as a matter of law. As the Second Circuit has held many times before, a sentence is substantively unreasonable "only in exceptional cases where the trial court's decision cannot be located within the range of permissible decisions."

I must next address the majority's disagreement with my conclusion that Mr. Jenkins is a high risk to reoffend and that I ignored "widely available definitive research demonstrating that recidivism substantially decreases with age." Again, I emphasize the importance of relying on meaningful comparisons, statistics, and research. There are several reasons to seriously doubt the majority's proposition that the rates of recidivism for child pornography offenses follow a general pattern of recidivism that decreases with age.

First, as the Sentencing Commission statistics

show, among all offenders sentenced in 2016 for child pornography offenses, almost half, 46 percent, were 41 years of age or older, and more than half of that group were over 50. The percentage for these age groups are slightly higher in each of the preceding six years, see United States Sentencing Commission, Sourcebook of Federal Sentencing Statistics 2010 to 2016, at Table 6. This table, which provides the Age of Offenders in Each Primary Offense Category, is broken down by seven age groups starting with "Under 21" and ending with "Over 50." For the category of child pornography, these statistics reveal for each year, from 2010 to 2016, the number of child pornography cases doubled or almost doubled from the age group "36 to 40" to the age group "41 to 50." Moreover, for each of the seven years, the percentage of cases were highest for ages 41 to 50 and for those over 50, and second, with the exception of 2013, which had a slight decrease, the number of cases continued to increase from the age group "41 to 50" to age group "over 50." These statistics belie the majority's notion that Mr. Jenkins will "age out" of this type of offense when he is released from prison at the approximate age of 56, as it appears child pornography offenses increase, not decrease, with age. This is the line -- this is in line with one study's findings that the recidivism rate for child pornography offenders increases, rather than decreases, over

time. See *Examining the Criminal History and Future Offending of Child Pornography Offenders: An Extended Perspective Follow Up Study*, Law and Human Behavior. This study also found that the longer that an offender is in the community, the greater the likelihood that he will be caught reoffending.

I believe recidivism research and studies relating to sexually dangerous behavior by child pornography offenders is relevant in light of the majority's assumption that Mr. Jenkins "never contacted or attempted to contact any minor" and "never spoke to, much less approached or touched, a child or transmitted explicit images to anybody." The government contends these assumptions are misplaced given the evidence submitted at trial, a picture found on Mr. Jenkins' computer of him with an unidentified young girl sitting close together, looking back at the camera. Having sat through the trial, having full knowledge of the case and firsthand knowledge of Mr. Jenkins' behavior, I am unwilling to make such conclusions, in part because we now -- we know very little about his sex offense history. As the Sentencing Commission cautioned in its 2012 report to Congress on child pornography offenses, "[i]t is well established that the actual rate of offenders' criminally sexually dangerous behavior is higher than the known rate," and "[i]t is widely accepted among researchers that sex offenses against children

often go unreported and undetected." And that's quoting United States Sentencing Commission, *Report to Congress: Federal Child Pornography Offenses*, December 2012.

Numerous studies have shown that the rate of reporting child exploitation crimes is extremely low, indicating any recidivism rates based on records of arrest or conviction should be viewed as underestimates. And I'm quoting from a study from the Mayo Clinic. As one study noted:

"The most serious problem with estimating overall recidivism rates ... is that substantial portion of sexual offenses remain undetected. Comparisons between police statistics and victimization surveys indicate that most sexual offenses, particularly offenses against children, never come to official attention. It is also implausible to expect that the offenders themselves will provide thorough accounts of their undetected sexual crimes. Consequently, any empirical estimates of sexual offenders' recidivism rates should be considered underestimates." And I'm quoting from *Predictors of Sexual Offender Recidivism*.

Other studies have highlighted the danger of relying on arrest or conviction records to assess the prevalence of child sex offenses. For example, in one recent study of child pornography offenders, the authors found that if arrests and convictions were the only indicator used, the

percentage of these offenders would have prior contact -- who had prior, excuse me -- who had prior contact offenses with children was low, approximately 12 percent. Where, however, studies used polygraph testing, or some other means to insure honest self reporting, such as anonymity or immunity from prosecution as part of a treatment program, the numbers were radically different. The studies with these types of validations determined that over half such offenders admitted prior sexual contact with children.

In its 2012 report to Congress on child pornography offenses, the Sentencing Commission highlighted the following: One, all child pornography offenses, including the simple possession of child pornography, are extremely serious because they both result in perpetual harm to victims and validate and normalize the sexual exploitation of children; two, some federal offenders who commit non-production child pornography offenses also have engaged in sexually dangerous behavior. Existing studies, which have employed different methodologies and examined different offender populations, have yielded inconsistent findings concerning the prevalence rate of other sex offending by non-production offenders; three, it is well established that the actual rate of offenders' criminally sexually dangerous behavior is higher than the known rate; polygraph testing is an important part of the treatment of child pornography

offenders. Polygraph testing encourages offenders in treatment to be truthful, which can advance the goals of treatment; researchers are beginning to develop actuarial risk assessments to gauge child pornography offenders' risk of sexual recidivism. Two primary factors that appear to be correlated with criminal sexually dangerous behavior are an offender's antisociality and his sexual deviance; and the Commission's study of 610 offenders sentenced under the non-production Guidelines in fiscal years '99 and 2000 found their rate of known general recidivism was 30 percent. However, caution should be exercised when evaluating any recidivism study, particularly involving sex offenders, because the known recidivism rate is lower than the actual recidivism rate.

I believe these highlights from the Commission's report have serious implications concerning Mr. Jenkins and whether this court's sentence was unreasonable in light of his individual and atypical characteristics. He has never admitted any wrongdoing, he has blamed the victims, he was compelled to bring his child pornography collection into Canada knowing the risk of being caught, which demonstrates his addiction to viewing the sexual abuse of children. Without polygraph testing, we will likely never know more about Mr. Jenkins' offense conduct or his sex offending history. Existing studies have yielded inconsistent findings

concerning the prevalence rate of sex offending by non-production offenders and is well established that the actual rate of offenders' criminally sexually dangerous behavior is higher than the known rate. This is why caution should be exercised when concluding that someone has never committed another sex offending behavior. The good news is that researchers are beginning to develop actuarial risk assessments to gauge child pornography offenders' risk of sexual recidivism. And so far, an offender's antisociality and sexual deviance are the two primary factors that appear to be correlated with criminal sexually dangerous behavior.

The antisocial risk factor is particularly relevant in my sentencing decision in Mr. Jenkins' case because, as the record shows, I ordered him to undergo a psychological evaluation to determine his competency and his behavior was attributed to narcissistic antisocial personality traits rather than a mental disease or defect. Among other things, the evaluation contained the following statements or conclusions which are pertinent to Mr. Jenkins' character and this court's finding that he is a danger and is likely to reoffend. I'm quoting from page 5, first of all, it's quoting, "It appeared Mr. Jenkins presented himself in a consistently favorable light when completing a self-report. Therefore, as a result of his tendency to minimize or deny problem areas, the evaluator recommended his resulting

profile and interpretive hypotheses be considered cautiously as they may underrepresent the extent and degree of any significant findings. Furthermore, despite his defensive approach to the test, Mr. Jenkins endorsed distrust; interpersonal hostility; rigidity; low frustration tolerance; and inflated self-esteem. He had a strong need for control and expects respect from others."

From page 6, "He did not meet the criteria for a known mental disease or defect. However, given his presentation, he appeared to display some narcissistic and antisocial personality traits. The evaluator noted his interactions with others would continue to be complicated by his maladaptive personality traits. Furthermore, his demeanor and beliefs regarding the proceedings and the persons involved was most likely attributable to his antisocial attitude and significant irritability. Mr. Jenkins doubted the charge was serious, stating 'they're trying to make it out to be a big deal.'"

Page 7, "It is noted that Mr. Jenkins understood the consequences of committing perjury; he described his relationship with prior attorneys as problematic because they would not follow his directives; and the evaluator concluded Mr. Jenkins was not willing to consider their opinions due to his narcissistic and antisocial characteristics."

Pages 8 and 9. "The evaluator concluded

Mr. Jenkins' cynicism appeared to reflect his antisocial and narcissistic attitudes, as well as his ongoing frustration and irritability regarding his case; the hostile themes of his writings appeared to extend from his apparent frustration over the lengthy legal process and his resentment over the proceedings; his hostile behavior towards the Judge was a result of his frustration over legal proceedings; and he was capable of managing his behavior as it was volitional."

Quoting again from the Sentencing Commission's report in 2012:

"Some researchers have concluded that the single most significant factor associated with criminal sexually dangerous behavior committed by child pornography offenders (in particular, their commission of sexual contact offenses) is their degree of antisociality, as measured on the antisocial behavior scale. This recent research concerning child pornography offenders is consistent with earlier research that concluded that antisociality, when coupled with sexual deviance, is a strong predictor of sexual recidivism among sex offenders generally. Because antisociality is typically manifested during an offender's childhood and further because the typical PSR does not contain extensive information about criminal and other antisocial acts committed by offenders before the age of majority, the Commission's special coding project of child pornography

cases was unable to specifically examine antisociality among offenders."

Given Mr. Jenkins' antisocial characteristics and his offense conduct, I do not believe the sentence I've reimposed is unreasonable in light of what we know and what we do not know about him. We know that Mr. Jenkins had a large collection of child pornography that he was transporting into Canada. However, we do not know when he obtained these files or when he first started viewing child pornography. We know that Mr. Jenkins stored child pornography on three different devices and he possessed a total of 3,811 images and 109 videos. His collection consisted mostly of prepubescent female children; some bound with chains and ropes; some being forced to perform oral sex on adult men; some being raped by adult men. He had text documents containing passwords to access websites offering child pornography; one of which appeared to be a members-only site. He saved child pornography sites in his "favorites" folder on his Toshiba laptop computer. Child pornography files that were transferred to his 4GB thumb drive were wiped from his Toshiba laptop using CCleaner software, which is a program used to clean and eliminate file history; internet activity; and other residential data maintained by a computer's operating system. No illicit material was found on his second laptop computer; however, this computer also

had the wiping software. Mr. Jenkins denied knowing child pornography was on his computer and he denied any knowledge of the two thumb drives. He has never made one single attempt to admit his wrongdoing; and therefore, we know nothing about his sex offending history. Accordingly, making conclusions without adequate information is something I am unwilling to do when it comes to protecting the most precious and vulnerable victims in our society. Rather, I will be cautious and carefully weigh the 3553 factors in order to impose a sentence that is consistent with those factors and is not greater than necessary; one that includes a lengthy period of community supervision and necessary conditions of supervision.

So I go back where I started three years ago, to fashion a sentence that is just, reasonable, and not greater than necessary to achieve the goals of sentencing. I have carefully considered the nature and circumstances of the offense and the history and characteristics of Mr. Jenkins and find a sentence of 200 months is sufficient but not greater than necessary to meet the goals of sentencing. Such a sentence accounts for the important difference between those who accept responsibility for their conduct, who do not commit perjury, and who do not obstruct justice and those like Mr. Jenkins, who relentlessly claimed he did nothing wrong, repeatedly blamed others, including the victims of the

offense. Mr. Jenkins' behavior since his arrest and his narcissistic and antisocial personality traits demonstrate he is a high risk of reoffending. Accordingly, I have imposed a sentence that reflects the seriousness of his offense, that promotes respect for the law, and provides adequate deterrence and that protects the public.

Supervised release terms and special conditions. I will now address the supervised release term of 25 years and the special conditions that are addressed in the mandate. I first note that the Second Circuit has consistently upheld long terms of supervised release, including life terms, in non-production cases. In *Brown*, who was convicted in the Northern District of New York of possession of child pornography and who appealed his lifetime term of supervised release, the Second Circuit held:

"In light of the specific circumstances of Brown's offense, the fact that the Sentencing Guidelines recommend a lifetime of supervised release, U.S. Sentencing Guidelines Manual 5D1.2(b), and the fact that Congress has found that the high rate of recidivism of sex offenders does not decline with age, citing *United States v. Hayes*, we do not find the district court abused its discretion in sentencing Brown to a lifetime term of supervised release."

Incorporating my findings regarding the imprisonment term, I believe a lengthy period of supervised

release is necessary to protect the public and deter the defendant from reoffending. Statistics and studies demonstrate that recidivism rate for child pornography offenders increase with age and over time. Given Mr. Jenkins' lack of respect for the law, his failure to accept any responsibility for his actions, and his narcissistic and antisocial personality traits, a 25-year term of supervised release is reasonable and is not greater than necessary to comply with the 3553(a) factors; and therefore, this term is reimposed today.

Three years ago, I imposed a special -- some special conditions that were either self-evident from the record or reasonably related to Mr. Jenkins' offense and his characteristics. I was, and still am, guided by the statutory authority and case law when imposing special conditions of supervised release. Pursuant to 18 U.S.C. Section 3583(d), the court may order any condition that it considers appropriate as long as the condition is, one, reasonably related to certain sentencing factors set forth in 18 U.S.C. Section 3553(a)(1) and (a)(2); two, involves no greater deprivation of liberty than is reasonably necessary to implement the statutory purposes of sentencing; and three, is consistent with the pertinent Sentencing Commission policy statements.

In accordance with 18 U.S.C. Section 3583(d),

United States Sentencing Guidelines provide that a district court may impose conditions of supervised release to the extent that such conditions are, one, reasonably related to the nature and circumstances of the offense and the history and characteristics of the defendant; the need for the sentence imposed to afford adequate deterrence of criminal conduct; the need to protect the public from further crimes of the defendant; and the need to provide defendant with needed educational, vocational training, medical care, or other correctional treatment in the most effective manner; and two, involve no greater deprivation of liberty than is reasonably necessary for the purposes set forth above and are consistent with any pertinent policy statements issued by the Sentencing Commission. With respect to the reasonably related requirement, "a condition may be imposed if it is reasonably related to any one or more of the specified factors," quoting from *United States v. McLaurin*. Conditions of supervised release may restrict liberty to the extent reasonably needed to achieve the above purposes. A district court retains wide latitude in imposing conditions of supervised release and "we therefore review a decision to impose a condition for abuse of discretion." Nevertheless, the district court's broad discretion in tailoring conditions of supervised release to meet the specific circumstances of a given case is not untrammeled and "we must carefully

scrutinize unusual and severe conditions," quoting *United States v. Brown*.

In *Johnson*, the Second Circuit stated, "In order to satisfy the Due Process Clause, supervised release conditions need not be cast in letters six feet high, or describe every possible permutation, or spell out every last, self-evident detail; conditions may afford fair warning even if they are not precise to the point of pedantry." They give the person of ordinary intelligence a reasonable opportunity to know what is prohibited so they may act accordingly.

As to the role of the district court and probation officers, the Seventh Circuit emphasized, "[i]n reviewing contested conditions of supervised release, the Court of Appeals must be mindful of the fact that the sentencing judge is in a superior position to find facts, and judge their import in the individual case" and "[p]robation officers must be allowed a degree of discretion in performing their difficult job and, at some point, Court of Appeals must fairly presume defendant's probation officer will apply conditions of release in a reasonable manner."

In light of the *Jenkins* mandate and the relevant case law, I have carefully reviewed the previously imposed special conditions and will reimpose some while tailoring others. These special conditions are reasonably related to the defendant's history and characteristics, as

well as to the nature and circumstances of his offense. Furthermore, they are necessary to achieve the purposes of deterring further criminal activity, protecting the public, and promoting defendant's rehabilitation, all while involving no greater deprivation of liberty than is reasonably necessary to serve these purposes. As noted above, a condition need only be reasonably related to one of the specified factors. Special conditions number 2, 3, 4, and 5, as well as 6 will remain the same. Conditions number 1 and 7 will be modified, and conditions 8 and 9 will not be reimposed because Mr. Jenkins has paid the $40,000 fine and the $12,000 restitution order has been satisfied.

The new special condition number 1 reads as follows: You must not have direct contact with any minor you know or reasonably should know to be under the age of 18 without the permission of the probation officer. If you do not have any direct contact -- if you do -- excuse me. If you do have direct contact with any minor you know or reasonably should know to be under the age of 18 without the permission of the probation officer, you must report this contact to the probation officer within 24 hours. Direct contact includes written communication, electronic communication, in-person communication, or physical contact. Direct contact does not include contact during ordinary daily activities in a public place. The modified language

addresses several concerns raised in the *Jenkins* mandate. Specifically, the updated condition specifically allows for incidental contact at a supermarket for instance; it clearly defines the boundaries of the restriction using common sense or ordinary intelligence standards; it allows the defendant to seek permission to have contact with a minor; and it involves no greater deprivation of liberty than is necessary to afford adequate deterrence to criminal conduct and to protect the public. Like the *Johnson* court, I have refined the terms of the condition to involve purposeful initiative to have contact with a minor which allows a person of ordinary intelligence to know what is prohibited. Moreover, the structure of the modified language clearly indicates that inadvertent contact with minors does not result in violation of the condition. This condition is reasonably related to Mr. Jenkins' offense and involves no greater deprivation of liberty than is necessary. Given the nature of his crime, it is not unreasonable to restrict an individual who takes pleasure in viewing the rape and sexual abuse of children from unsupervised contact with children.

New special condition number 7 reads as follows: If the defendant's employment requires the use of a computer, the defendant may use a computer in connection with his employment provided the defendant notifies his employer of the nature of his conviction and the fact that his offense

was facilitated by the use of a computer. The probation officer must confirm the defendant's compliance with this notification requirement.

The modification removes the requirement that employment be approved by the probation officer. This condition is reasonably related to Mr. Jenkins' offense and circumstances because he used a computer to facilitate his crime and he attempted to blame his employees by falsely claiming they had access to his computers and suggesting that they must have put the child pornography on his equipment. The government's evidence at trial also established he kept child pornography on his laptop computer intermingled with his business records and contracting estimates and he saved child pornography while conducting business. Accordingly, his condition -- this condition is necessary to monitor his computer use and to make sure his employer is aware of his conviction, thereby minimizing any inappropriate computer use. In the *MacMillen* case, the Second Circuit upheld the employer's notification condition for a defendant convicted of possessing child pornography, finding it was not overbroad. The Circuit reasoned:

"Moreover, MacMillen's offense of conviction -- possessing computerized images of child pornography that had been obtained via the internet -- adequately informs probation as to what circumstances might

present a risk of recidivism, thus warranting employer notification. This is underscored further by a different special condition of supervised release which specifically authorizes probation to monitor MacMillen's computer use and conduct unannounced inspections of any computers he may use -- including computers he uses at work. The circumstances of this case therefore make it pellucidly clear that employers are to be notified of MacMillen's conviction when, because of the nature of the employment, there is a possibility that MacMillen will have access to a computer, and thus be presented with the opportunity to obtain computerized images of child pornography."

Although I am not reimposing special condition number 8, the record should reflect that I would have reimposed the condition had Mr. Jenkins not paid his monetary penalties in full. The condition have remained -- would have remained the same but with the following caveat at the end of the condition: "unless you are in compliance with the payment schedule." The modified language provides, as long as a defendant remains in compliance with his payment schedule, new credit charges or additional lines of credit need not be approved.

My justification for this condition is important because the panel concluded that nothing in the record suggested that restricting Mr. Jenkins from incurring

new debt was reasonably necessary. By no means would this condition have prevented Mr. Jenkins from buying a drink on an airplane or taking an Uber ride, as suggested by the panel. Rather, in line with the Sentencing Commission's Policy Statement at 5D1.3(d)(2), the condition was imposed because he was ordered to pay a fine and restitution. This condition was particularly reasonable in Mr. Jenkins' case because, as the record demonstrates, he attempted to hide his substantial assets from the court to make himself appear to be indigent and he failed to provide any financial information during his presentence investigation. The condition was therefore necessary to adequately monitor his financial situation and to ensure he paid his cost -- court-ordered monetary obligations while restricting his collection of debt.

None of the special conditions imposed today prevent Mr. Jenkins from leading a normal life. While the panel believed the conditions imposed meant Mr. Jenkins would never be able to pay his debt to society, Mr. Jenkins has already proven that wrong by paying his debts while incarcerated. While the panel believed the special conditions would have likely prevented him from developing and maintaining meaningful relationships, the record demonstrates that he will likely be -- that will likely only be the case as a result of his own personality

characteristics. As to employment, Mr. Jenkins is college educated and he operated his own business for 20 years. Beyond his personality traits, I find no reason to believe he will have any trouble obtaining employment should he choose to do so.

In conclusion, I note that by the operation of law, a district court may modify, reduce, or enlarge the conditions of supervised release at any time prior to the expiration or termination of a term of supervised release. Therefore, at any time during the supervised release period, Mr. Jenkins or the probation officer can certainly apply for modifications or removal of a special condition, and the court will entertain such applications as long as there is a basis to do so for that application to go forward. This court also obviously has the authority to grant early discharges from supervision should it be warranted.

(A discussion was held off the record between The Court and the courtroom deputy.)

THE COURT: The counts, I imposed a 200-month sentence, Counts 1 and 2, those sentences will run concurrent for a total of 200 months.

With regard to what appears to be the new arguments submitted from the defendant, defense counsel with respect to restitution and fine, the court finds that those were appropriate and proper. The government submitted their

arguments with regard to that and the court acknowledges that, those will be maintained as already been collected and will not be disturbed in this resentencing.

Anything from the government?

MS. THOMSON: No, your Honor.

MS. PEEBLES: Your Honor, I just note our objection to the court's sentence, but I also want to make clear that Mr. Jenkins, the fine that was imposed, the $40,000 actually cost him more than $60,000 because they reached into his retirement account and as a result, it cost him penalties and unpaid interest, so it actually cost him more than the $40,000 that this court initially imposed. And I just want the record to be clear that that in fact is how that debt had been satisfied. Thank you.

THE COURT: Okay. Anything else?

MS. THOMSON: No, your Honor.

THE COURT: Okay.

(A discussion was held off the record between The Court and the courtroom deputy.)

THE COURT: And certainly, as is always the case, an appeal must be filed within 14 days of the date of the judgment being filed in this case which will be refiled and, as I indicated, my sentencing statement will be filed with the statement of reasons. Okay?

MS. PEEBLES: Thank you.

THE COURT: All right.

THE CLERK: Court is adjourned.

(A discussion was held off the record.)

MS. THOMSON: Your Honor, just with regard to the statutory maximum for the second count which would be the possession, it's 120 months. Your sentence of 200 months, I heard you indicate that the two counts will be concurrent to each other and I just would like to put on the record that the 200 months would be for Count 1 and it would be 120 months for Count 2?

THE COURT: Yeah, you know, I think that's clear, but so it is clear on the record, that's exactly what's happening, they run concurrent, it's -- Count 1 is the --

MS. PEEBLES: Transport.

MS. THOMSON: Transportation.

THE COURT: -- transportation, and Count 2 is the --

MS. PEEBLES: Possession.

THE COURT: -- possession and they run concurrent together for a total of 200 months, okay?

MS. PEEBLES: Thank you.

THE COURT: All right.

(Court Adjourned, 12:06 p.m.)

CERTIFICATE OF OFFICIAL REPORTER

I, JODI L. HIBBARD, RPR, CRR, CSR, Federal Official Realtime Court Reporter, in and for the United States District Court for the Northern District of New York, DO HEREBY CERTIFY that pursuant to Section 753, Title 28, United States Code, that the foregoing is a true and correct transcript of the stenographically reported proceedings held in the above-entitled matter and that the transcript page format is in conformance with the regulations of the Judicial Conference of the United States.

Dated this 29th day of January, 2018.

/S/ JODI L. HIBBARD

JODI L. HIBBARD, RPR, CRR, CSR
Official U.S. Court Reporter